IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 509 of 1989

For Approval and Signature:

Hon'ble MR.JUSTICE J.N.BHATT and
MR.JUSTICE H.R.SHELAT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PRAKASH SHOLARAM

Versus

STATE OF GUJARAT

Appearance:
MS RV ACHARYA for the appellant.
MR ST MEHTA, APP for Respondent.

CORAM : MR.JUSTICE J.N.BHATT and
MR.JUSTICE H.R.SHELAT

Date of decision: 21/07/1999

ORAL JUDGEMENT(Per J.N.Bhatt, J.)

Whether the appellant-original accused, husband of the deceased Bai Basu, is rightly held guilty for having committed an offence punishable under section 302 of the Indian Penal Code (IPC) by committing the murder of his wife by setting her ablaze or not ? This is the substratum of this conviction appeal under section 374 of the Code of Criminal Procedure, 1973 (Code).

The appellant, who is original accused No.1 (hereinafter referred to as the accused) husband of the deceased Bai Basu, by filing this appeal through Jail has questioned the legality of his conviction under section 302 of the IPC recorded by the learned Sessions Judge, Surat in Sessions Case No.11/89, and the resultant imprisonment for life and a fine of Rs.1,000/- and in default to suffer RI for one month more. The accused was provided legal aid.

A short spectrum of relevant and material facts leading to the rise of this appeal needs narration at the first stage so as to examine the merits of the appeal and the challenge against it. Appellant-original accused No.1 came to be charged for having committed the offence of murder of his wife by pouring kerosene on her and by putting her ablaze at 11.45 p.m. on 11.9.88 in his house. Original accused No.2, father of accused No.1, was charged for having abated the accused No.1. Since he has been found not guilty and acquitted by the Trial Court and which has not been questioned by the State, the further probe of the alleged guilt of accused No.2 is not warranted.

Deceased Bai Basu died on 14.9.88 at about 4.00 a.m. during the course of treatment in the hospital. Thus, deceased survived more than two and a half days. The offence came to be registered against the accused persons by the Udhna Police upon the entry and vardhi given by the Police Head Constable on duty in the Civil Hospital, Surat. Pursuant to the 'vardhi' received by Head constable Shambu Hira in Udhna Police Station, investigation started by the PSI after registering offence of murder against the accused. Upon completion of the investigation, chargesheet followed before the learned Sessions Judge, at Ex.3 under section 302 read with section 114 of the IPC against both the accused persons to which they denied and hence the trial proceeded and upon appreciation and evaluation of the evidence of the prosecution, the Trial Court convicted accused No.1, husband of the deceased and acquitted original accused No.2, father of accused No.1 and father in-law of the deceased, by giving the benefit of doubt. This is how this appeal is filed by the original accused No.1, Prakash, husband of the deceased.

Learned advocate appointed in legal aid, Ms.Acharya, raised the following contentions before us in support of this conviction appeal and contended that the conviction is bad and illegal and requires to be quashed:

(1) that the important witness, nephew of the accused, Santosh, who was staying jointly in the house is not examined and therefore, adverse inference should be drawn.

(2) that the sister of the deceased and her husband are neighbours and the investigation does not disclose as to why their statements were not recorded and they were not examined.

(3) that FIR would be one which was lodged before the PSO on Udhna Police station by one prosecution witness Champakbhai to whom Sitaram had apprised about the incident and Sitaram is the neighbour who had reached at the venue of offence in which accused husband of the deceased is not involved and, therefore, that evidence is withheld from the scrutiny of the Court.

(4) that the evidence of prosecution witness No.1 Sitaram is reliable and could not have been discarded.

(5) that the evidence of the Medical Officer does not indicate that there was an interpreter. In that, it was contended that the deceased knew only Nimadi dialect and nobody has clearly stated that it was a language understood by the Investigating Officer and the witnesses of the prosecution.

(6) that recording of dying declaration by the Executive Magistrate without taking the thumb mark impression of the deceased Bai Basu as she was unable to put her thumb mark impression is in direct conflict with the evidence of PSI who had recorded dying declaration of the deceased in which he took the thumb mark impression of the deceased and therefore, the benefit of doubt should go to the accused.

(7) that the neighbours have not been examined without any explanation or reason. This, also therefore, creates material suspicion about the version of the prosecution witness. The accused himself had sustained burn injuries as he had attempted to extinguish fire on the person of the deceased with the help of quilt and thereafter he had gone out in search of vehicle so as to take his burnt wife to the hospital for treatment and this aspect radiates an imprint of innocence on

the part of the husband.

(8) The conduct of the accused in rendering help is also counter to the prosecution case.

Learned Additional Public Prosecutor Mr S.T.Mehta has countered the aforesaid contentions and he has, forcefully, submitted that the prosecution has, successfully, established the complicity of the accused beyond reasonable doubt by providing nexus between the death of the deceased and the act of the accused husband, Prakash. It was, therefore, submitted that the conviction recorded by the Trial Court in holding the appellant guilty for having committed murder of his wife and the resultant minimum sentence of imprisonment for life may be upheld and maintained. He has placed reliance on a decision of this Court in Aher Lakhman Bhura v. State of Gujarat, 1995 (2) GLR 1285.

We have heard the rival versions and, dispassionately, examined the testimonial and the documentary evidence relied on by the prosecution criticised by the learned advocate for the accused in defence. The relevant proposition of law pertaining to dying declaration is also elaborately argued before us. In our opinion, upon assessment and evaluation of the evidence relied on by the prosecution, the view taken by the Trial Court and the ultimate conclusion recorded for holding the accused-husband, Prakash, guilty for having committed the offence under section 302 of the IPC requires no interference being fully merited and justified.

Needless to reiterate that when the appellate Court, broadly, agrees with the views and the proposition and the ultimate conclusion recorded by the Trial Court, it would not be necessary for the appellate Court while appreciating the merits of the appeal to reiterate all the grounds minutely and meticulously. We have noticed in course of the hearing while examining the evidence of the prosecution that the conclusion recording guilt of the accused-husband for committing murder of his wife by putting her on fire after pouring kerosene on her is not only, clearly, borne out, but has been successfully and succinctly, spelt out without any shadow of doubt in view of the evidence in general and the three dying declarations of the deceased recorded.

The proposition of law in relation to the dying declaration jurisprudence has been elaborately expounded, explored and settled by host of precedents and authorities. The conviction could be founded upon sole

dying declaration. Dying declaration made by the deceased in anticipation of her death is relevant under section 32 which must be read in conjunction with the provisions of section 158 of the Indian Evidence Act, 1872. There is a purpose and policy behind placing implicit reliance upon the statement of the deceased being a dying declaration in view of the provisions of section 32(1) read with section 158 of the Indian Evidence Act. The Court can act upon and place reliance on sole dying declaration for holding the accused guilty if the statement made by the deceased which is attracting the provisions of section 32(1) read with section 158 of the Evidence Act is found to be a true and correct version of the deceased without being tainted or prompted and voluntarily made by the deceased without any fear and freely. The Court can act upon it fully and conviction can be founded upon it even in absence of any other evidence. The law is extensively and lucidly explored and propounded by the Hon'ble Apex Court in various pronouncements. However, the history is traced out in Paniben v. State of Gujarat, AIR 1992 SC 1817. A person who is making a statement seeing the oncoming and approaching death could be presumed to state true and correct version. This principle is also, rightly, relied on as it is based upon the legal maxim "Nemo moriturus proesumitur mentiri -- a man will not meet his Maker with a lie in his mouth." Merely because one or the other minor discrepancy is noticed in more than one dying declarations of the deceased which, as such, do not affect the very heart and theme of the prosecution case and the cause of death, the same could not be said to be conflicting and unreliable. This proposition is also very well settled. In our opinion, the prosecution has, rightly, placed reliance on the decision of this Court in Aher Lakhman Bhura (supra). Conviction, thus, can be founded upon a sole dying declaration if it represents true and correct version of the deceased. The Trial Court has placed reliance on the dying declaration recorded by the PSI in the form of FIR on getting information from the Head Constable who was on duty in Civil Hospital where the deceased in injured burnt condition was taken for treatment, who gave her statement before the duty constable who in turn transmitted the information to the PSI and recorded the FIR as narrated by the deceased. The Trial Court has placed reliance on this dying declaration, Ex.35. The prosecution witness Head constable, Gambir Sadhu who was on duty at the hospital at the relevant time was examined. MLC registered entry is also produced. It came to be recorded by the Head constable, prosecution witness No.9, Gambir Sadhu at 2.30 a.m. on 12.9.98.

No doubt, an unsuccessful attempt was made on behalf of the defence before us by narrating the aforesaid submissions which we have enumerated so as to create a doubt about the veracity of the statement of the deceased and the authenticity of the prosecution version. Merely because a dying declaration states that nephew of the accused, Santosh, was residing in the same house which is the venue of offence and he is not examined that does not take the defence any further as nothing has been brought out that he was present at the relevant time and his evidence is withheld from the scrutiny of the Court.

It was also contended that the sister of the deceased and her husband were neighbours at the relevant time and they were not examined. Of course, close relatives like sister and her husband in a case like one could have thrown abundant light had they been present in or around the time of incident or thereafter. Nothing has been brought from the record to our notice to show that they were in know of the incident and they were witnesses. A capital was sought to be made out of the admissions made by PSI Shambu Hira, PW 6 at Ex.23 that the note made upon intimation given by the prosecution witness Champakbhai is not preserved and therefore it creates doubt about the actual and correct version of the prosecution case and the incident. It was, therefore, submitted that the genesis is withheld and the benefit should go to the accused. No doubt, the submission appears to be very captivating, but not convincing and sustainable for the reason that when one goes into the evidence of prosecution witnesses Champakbhai and Sitaram, it becomes clear that the information given by Champakbhai and the resultant entry at Ex.24 based on the intimation given by the prosecution witness No.1 Sitaram could not be said to be the first information as required under section 154 of the Code. At the best, it can be said to be a cryptic telephonic message wherein it was not disclosed whether cognisable offence as such had occurred. Therefore, the defence is not in a position to make any capital out of the said version and the so called admission of the prosecution witness No.6, Shambu Hira, examined at Ex.23.

We have noted that the conduct of the accused could not be said to be natural, spontaneous, consistent and compatible with the innocence as he did not react in a manner, ordinarily, a husband would react in a case of serious burning case of a near and dear one. Not only that it is noticed from the record that he was not available for long after the incident as he had gone out and the deceased, then injured condition, was taken to

the hospital for treatment by the neighbours. What will be the natural conduct of an innocent husband ? He and his father in such a grave and critical situation, had gone for hiring a vehicle, jointly, leaving the spouse suffering excruciating pains of burns at the mercy of others. It is highly unnatural. Therefore, not only that this conduct does not support the case of the defence, but it runs diametrically counter to the case advanced by the defence and squarely supports the version propounded by the prosecution. Nothing can be extracted from the evidence of prosecution witness No.1, Sitaram. Nothing also can be successfully earned or no advantage can be drawn from the fact that Sitaram stated that interpreter was not present and that deceased was only knowing Nimadi dialect and in absence of interpreter the evidence cannot be relied on. It may be stated that apart from the clarification made and the explanation given by the prosecution witness Sitaram in his evidence, it is not disputed before us that Nimadi dialect is a mixture of Hindi and Gujarati spoken by villagers on the border area. Therefore, it is not an unknown or foreign language. Again, the Nimadi dialect is known to prosecution witness Gambir Sadhu. Otherwise also, the prosecution has, successfully, established that the statements given before the PSO and PSI and before the Executive Magistrate were the declarations made by the deceased voluntarily in fit state of mind understanding what was being said. Therefore, the versions recorded in three dying declarations on different occasions by three different persons including one before the Executive Magistrate could not be said to be conflicting and contradicting on macro level affecting the heart and theme of the prosecution case. Of course, the Trial Court has only placed on the dying declaration recorded by PSO Gambir Sadhu. As earlier stated by us, even conviction can be founded upon a sole dying declaration if it is noticed, successfully, that it was the correct version. Of course, in our opinion, other two dying declarations were also reliable and merely because in one dying declaration thumb mark was not completely taken and in the other dying declaration before the Executive Magistrate which was recorded almost two hours after the second one, on account of burn injuries on the hands, could not be said to be unreliable. Since we have found that the culpability of the accused, husband of the deceased, is successfully transfixed by the evidence of the prosecution without any doubt in establishing that the deceased Basu, wife of the accused was set ablaze by the accused after pouring kerosene on her when she was sleeping together with the fact that the burn marks were also sustained by the accused-husband showing his

presence and involvement in the incident, we have no slightest hesitation in finding that the present appeal is required to be dismissed.

The Hon'ble Supreme Court in Vajrala Paripurnachary v. State of A.P., AIR 1998 SC 2680 has, succinctly, expounded the proposition relating to dying declaration and the applicability of the provisions of section 32 of the Evidence Act, and the value of the dying declaration. It was held that the recording of dying declaration by the Judicial Magistrate and the evidence of the Judicial Magistrate showing that she was in fit condition to make statement, discrepancy in dying declaration regarding exact spot where she was set ablaze neither affecting its credibility nor identity of the accused was blurred due to it. In that case, highlighting the value of dying declaration and converting the acquittal into conviction, the Hon'ble Apex Court has clearly propounded that micro level discrepancy in different statements turn out to be dying declarations should not warrant non-credibility or authenticity of the prosecution version.

After having taken into account the factual scenario emerging from the record of the case and having heard the learned advocate in defence of the accused and the learned Additional Public Prosecutor, Mr.Mehta and the evidence and the catalogue of facts coupled with the relevant proposition of law, we have no slightest hesitation in finding that the conviction appeal on hand, at the instance of the guilty husband, who killed his own wife, mercilessly, within a period of three months after the matrimony, a lady who was expecting spring years of life and the pink of young age of life was done away with and her life was cut short by the cruel hands of her own husband by setting her ablaze after pouring kerosene when she was sleeping, merits dismissal.

In the result, the appeal is required to be dismissed and accordingly, it is dismissed.

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